SEP 20 1989

No. 88-2125

In The

# Supreme Court of the United States

October Term, 1989

LOYER EDUCATIONAL TRUST,
LARRY McDONALD, TRUSTEE,

*Petitioner,*

v.

WAYNE COUNTY ROAD COMMISSION, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES AND HAROLD H. BONDY, Individually, Jointly and Severally, now County of Wayne, its Successor in Interest,

*Respondents.*

## PETITIONER'S REPLY BRIEF

IN RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

*– AND APPENDICES –*

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## REPLY TO RESPONDENTS' RESTATEMENT OF FACTS

**LET THERE BE NO MISUNDERSTANDING THAT REQUIRING IMPROVEMENTS TO THE OPPOSITE SIDE OF THE STREET TO BE PAID FOR SOLELY AT LOYER'S EXPENSE AS A CONDITION OF OBTAINING A DRIVEWAY PERMIT WAS ALWAYS THE ISSUE IN THIS CASE AND WAS SO STIPULATED BY THE PARTIES AT THE OUTSET OF THE PROCEEDINGS.**

(See Appendix O, Excerpt of Transcript of Proceedings, p. O-1, *infra.*)

The Brief of Respondents (hereinafter ROAD COMMISSION) improperly uses the statement of facts for argument. The ROAD COMMISSION hedges on the question of whether the improvements to the opposite side of the street in this case were required by it. The ROAD COMMISSION wants this Honorable Court to believe the improvements were caused by PETITIONER (hereinafter LOYER) in moving its driveway. LOYER moved the driveway in an attempt to resolve the case before trial to alleviate the condition of the permit requiring installation of the costly road improvements on the opposite side of the road.

The ROAD COMMISSION has commented on or inserted items not a part of the record in its statement of facts, including but not limited to an allegation of storage of construction equipment in the vacant building. This did not happen.

The ROAD COMMISSION also misstated the position on the bond which was offered to LOYER to be posted to open the project. This bond was for a low amount and was without a ceiling or fixed penal sum; the testimony at trial disclosed that if LOYER had posted the bond and additional money was required to install the improvements, the ROAD COMMISSION would have sought the additional amounts from LOYER. This was no offer to allow LOYER to mitigate damages. (See Appendix Q, Excerpt of Transcript of Proceedings, p. Q-1, *infra.*)

Additional facts were either misrepresented or misstated, but they do not affect the legal issues presented.

## ARGUMENT

### I.

### THE FEDERAL QUESTION

LOYER properly preserved and raised the federal questions throughout trial and appeal. The *Federal Civil Rights Act* and *discrimination* against LOYER was plead in the original complaint in state court. (See Appendix L, p. L-6 of Petition for Certiorari.) Michigan merely requires a pleading which informs the other party of the facts upon which the case is based.

Michigan General Court Rules of 1983, GCR 111 GENERAL RULES OF PLEADING:

> .1 Statement of Claim. A pleading which sets forth a claim for relief, whether a complaint, counterclaim, crossclaim or third party claim, shall contain
>
> (1) a statement of the facts without repetition upon which the pleader relies in stating his cause of action with such specific averments as are necessary reasonably to inform the adverse party of the nature of the cause he is called upon to defend; . . .

(Appendix P, p. P-1, *infra.*)

The Road Commission raised no objections in the lower courts as to the form in which the issues were raised.

LOYER raised the "DUE PROCESS" and "EQUAL PROTECTION" arguments on Appeal to the Michigan Court of Appeals. The Michigan Court of Appeals decided

these issues without analysis or discussion. (See Appendix F, pp. F-7, F-8 of Petition for Certiorari.)

LOYER raised the "TAKING WITHOUT JUST COMPENSATION" issue in the trial court, which was also decided by the Michigan Court of Appeals without any analysis. (See Appendix F, pp. F-7, F-8 of Petition for Certiorari.)

LOYER was never given the opportunity to argue or brief these issues before the Michigan Supreme Court because they denied the Application For Leave To Appeal and Motion For Reconsideration.

## II

## RESPONSE TO RESPONDENTS' QUESTION

The ROAD COMMISSION raised the following question:

> IF A STATE COURT'S JUDGMENT RESTS ON A STATE GROUND, THE UNITED STATES SUPREME COURT HAS NO JURISDICTION TO REVIEW THE CASE, AND CERTIORARI CANNOT BE GRANTED.

This issue is clearly erroneous as applied in this case, in view of the fact that LOYER raised the federal questions in the state court. An adherent component of the federal questions presented was that "state action" conflicted with federal constitutional mandates.

Under the ROAD COMMISSION'S position on this matter, the United States Supreme Court would never be able to review a state action as violative of the United States Constitution because it was a "state matter". The cases cited by the ROAD COMMISSION do not apply here because the "DUE PROCESS," "EQUAL PROTECTION," and "TAKING WITHOUT JUST COMPENSATION" issues

were all raised on appeal to the Michigan Court of Appeals. A reading of the case cited in support of the ROAD COMMISSION'S position, *Williams* v. *Kaiser*, 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 398 (1945), held that the state action was reviewable based on "Due Process" grounds and that the state action was repugnant to the United States Constitution.

The real issue in this case is:

> **Whether the ROAD COMMISSION can compel a private individual to install offsite improvements which specially benefit surrounding landowners and the public at the private individual's expense without apportioning the cost of the improvements among those specially benefited thereby.**

The theory of authority to regulate presupposes that the person being regulated has dominion and control over the person or property which is the subject of the regulation.

In the *LOYER* case, LOYER had no dominion and control over the roads or drains on the other side of the street, nor did LOYER have dominion and control over the private gravel road — EMIT — leading to the subdivision on the opposite side of the street. The Subdivision could have denied permission for LOYER to do any work on their private road since it had never been dedicated to the County. While it would have been highly unlikely that the Subdivision would have turned down the opportunity to have an improvement paid for at LOYER'S expense, it nevertheless illustrates the lack of dominion and control LOYER exercised over property on the other side of the street.

It is LOYER'S position that its driveway could be reasonably regulated, however, that regulation does not

extend to property over which it had no dominion and control. Furthermore, LOYER was asked to improve the road from a two lane street to a four lane street in addition to improving the drainage system. This was not a case where the alterations to the road were solely attributable to LOYER. This was a case where LOYER could have attached its driveway to the existing road surface and drain system without any of the improvements required by the ROAD COMMISSION except for the fact that the ROAD COMMISSION wanted to make a capital improvement project out of a driveway permit application. In so doing, the ROAD COMMISSION crossed the line between regulation and confiscation.

The ROAD COMMISSION could not force the subdivision across the street from LOYER to put in the same improvements requested of LOYER because, according to *Arrowhead Development Co.* v *Livingston County Road Commission*, 413 Mich. 505, 322 N.W.2d 702 (1982), the Subdivision Control Act did not contain a provision for apportioning the cost of those improvements among properties specially benefited thereby. The ROAD COMMISSION would be left to one of two methods to finance the improvements had they chosen to do the improvements. These two methods are:

1. The general taxing power of the county; or
2. Declaring a Special Assessment District and assessing properties specially benefited on square foot or front foot basis.

The action by the ROAD COMMISSION was violative of "DUE PROCESS" and "EQUAL PROTECTION" because, neither the "DRIVEWAY ACT" (Appendix N of Petition for Certiorari) nor the "Rules" (Respondents' Appendix A of Brief in Opposition) promulgated by the ROAD COMMISSION apportioned the cost of offsite improve-

ments, which specially benefited the surrounding landowners and the public. The ROAD COMMISSION admittedly had "no standard to determine who had to pay what and when." (Petition for Certiorari, p. 7.)

The Michigan Courts should be reversed on this point. The *Arrowhead* case, *supra*, incorporates the reasoning of the "DUE PROCESS" and "EQUAL PROTECTION" clauses into its analysis. LOYER has merely requested the same treatment be applied to it as to others similarly situated.

Without direction from this Court, the ROAD COMMISSION'S authority will go unchecked:

> What would limit the ROAD COMMISSION from requiring LOYER to put in lanes for two miles in either direction from the shopping center as part of a condition for obtaining a driveway permit if they elect to make that part of the driveway rules?
>
> ANSWER: Nothing except the limitation required by the "DUE PROCESS CLAUSE" and "EQUAL PROTECTION CLAUSE" requiring the costs to be apportioned among those specially benefited.

## III

## POLICY CONSIDERATIONS

This case is important not only to LOYER, but to all of the people of the State of Michigan and the people of the United States. As this country becomes more highly developed every local government and developer will have to confront this issue.

When a developer develops property and is required to put in offsite improvements, what are the limitations on

the power of the State governments to require such improvements? One limitation should derive directly from this case — The "Due Process" and "Equal Protection" clauses of the United States Constitution require that any offsite improvements which specially benefit surrounding landowners and the public be apportioned among those specially benefited.

This case is also important to make local governments accountable for their actions in taking the use of private property. LOYER requires compensation for the taking of the use of the property by the denial of the driveway permit.

LOYER exhausted all of its state remedies in this action consistent with the holding in the case of *Williamson Planning Comm'n* v *Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) which was cited by Respondents in their brief.

The position of the ROAD COMMISSION and the State of Michigan Courts has been one of avoiding the issues throughout the proceedings. No real analysis of the fundamental issues raised by this case was attempted by the state courts.

LOYER has not requested that any greater burden be placed upon the government in this case than private individuals would place upon themselves. If two individuals were to build a road which serviced both of their properties equally, would they not agree to divide the costs of that road between themselves? LOYER has not asked to be treated any differently.

## CONCLUSION

PETITIONER, LOYER, requests that this Honorable Court reverse the Michigan Court's holding in *Loyer* v *Wayne County Road Commission, et. al.*;

PETITIONER further requests that money damages be granted for the taking of the use of the property by the wrongful denial of the Driveway permit;

PETITIONER further requests that this Honorable Court enter its ruling that the "Due Process Clause" and "Equal Protection Clause" require apportionment of the cost of offsite improvements which specially benefit surrounding landowners and the public.

Respectfully submitted,

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DATED: September 19, 1989

# APPENDICES TO PETITIONER'S REPLY BRIEF

***(Reprising the pagination from Petitioner's Writ of Certiorari)***

• • •

## APPENDIX O

### EXCERPT OF TRANSCRIPT OF PROCEEDINGS

* * *

[3] Detroit, Michigan
Friday, January 6, 1984 — at about 2:25 P.M.

THE CLERK: Loyer Educational Trust versus Wayne County Road Commission.

MR. HOLLAND: I am Gary Holland, appearing on behalf of the Loyer Educational Trust, Plaintiff in this matter.

MR. KRALL: Marty Krall, your Honor, appearing on behalf of the Wayne County Road Commission.

MR. GEORGE: John George, your Honor, appearing on behalf of the Charter, Township of Brownstown.

MR. HOLLAND: Your Honor, this matter was brought on today for a hearing for purposes of determining whether or not the preliminary injunction should issue or a writ of mandamus should issue in this case and basically I am asking for a bifurcated hearing and we've included elements of monitary damage in our complaint.

However, our primary interest is being able to open a shopping center that Plaintiff has constructed on Sibley Road in Brownstown Township.

The basis for our dispute is that we applied for a permit from the Board of County Road Commissioners in Wayne County to tap into certain utilities on Sibley Road being a sewer and water and whatever other utilities were necessary.

(4) The County Road Commissioners granted a permit subject to certain conditions, those conditions being that we would have to put a driveway into the shopping center in accordance with certain regulations that they had adopted and according to these driveway laws as set forth in the Michigan Statutes.

Part of the problem with that, the standards set up by the Road Commissioners included putting a passing lane on the opposite side of the street from my client's development and also doing other work including moving a county ditch in order to secure a passing lane on that side of the highway. My clients have basically no dispute in complying with any regulations that are reasonable for making their own driveway. The bone of contention here is that my client feels that there is no legal authority or any other authority to compel him to make road improvements to Sibley Road either under the driveway law or any other regulations that the Board of Road Commissioners might have.

We primarily are relying upon the case of *Arrowhead Development Company* v *Livingston County Road Commission*, 413 Mich 505.

Your Honor, we have brought Mr. Loyer here to testify today. However, I think the factual issues are relatively agreed upon.

MR. KRALL: The facts have been agreed upon to a (5) certain extent, your Honor.

THE COURT: I read the briefs that were submitted and it would seem that there isn't really a factual dispute as to what the Road Commission is asking the Plaintiff to do. It would appear to me that the facts are pretty much agreed upon.

MR. HOLLAND: Your Honor, what I would request is that if the facts as I have stated them are satisfactory to the Court and obviously my client cannot afford to put these improvements in, and that's his basic disagreement

with the Road Commission and he feels that he shouldn't have to put these improvements in, what I would suggest is that I be allowed to have one week to submit a brief and brief this Arrowhead case in relationship to this issue and allow the Road Commission to respond to that brief and have the Court decide it as a legal issue in view of the fact that these facts are not in dispute.

THE COURT: Let me ask the Road Commission, is it true that the facts are not really in dispute?

MR. KRALL: That is correct, your Honor. Counsel for the Plaintiff and myself have earlier, before the hearing, agreed to adopt the statement of facts contained in the Road Commission's pre-hearing brief, plus two additional facts, your Honor: One, that the Plaintiff does not contest that the passing lane is in fact required by the Road (6) Commission rules and further that Plaintiff does not contest that the passing lane is a safety feature but simply that the Road Commission is not authorized by statute to adopt the rule relative to requiring Plaintiff to install the passing lane.

THE COURT: So what it really boils down to is the legal issue as to whether or not the Road Commission could require that the Plaintiff put in the passing lane in order to get its permit to connect up with sewers and other utilities, is that right?

MR. HOLLAND: And to open their driveway for traffic into the shopping center, that's correct, your Honor.

THE COURT: What is the status right now with the shopping center? Is it completed?

MR. HOLLAND: Your Honor, it is almost completed. There are certainly some interior things to be done. However in a relatively short period of time the interior of the shopping center could be completed and people could be in there leasing the premises.

We have been held up for a couple of years by the Road Commission in opening up and obviously my client is losing money each day he cannot open and the dispute with the Road Commission is the impediment to allowing my client to open.

THE COURT: All right. As far as your suggestion (7) is concerned, what is the Road Commission and the Township's position on submitting this dispute on briefs?

MR. KRALL: Well, inasmuch as we did stipulate to the facts, your Honor, relative to the safety feature of the passing lane, we have no further evidence that would be necessary to put in. So we could submit the issue as a matter of law.

THE COURT: All right. Would you want an opportunity to argue after the submission of further briefs?

MR. KRALL: I believe that is necessary, your Honor.

THE COURT: Why don't we set up a time table then for submission of briefs. You indicated for the Plaintiff a week?

MR. HOLLAND: I would like a week from Monday. I would like to have the extra weekend if I could, your Honor.

THE COURT: I have no problem there. How about the Road Commission and the Township, the time for a response?

MR. KRALL: Ten days after the submission of Plaintiff's brief?

THE COURT: Ten days was going through my mind too. So why don't we go with — let's see, a week from Monday is the 16th. The Court will be closed. Why don't we make it the 17th.

MR. HOLLAND: Okay.

(8) THE COURT: And then 10 days from then would be the 27th — what day of the week is that, Jack?

THE CLERK: Friday.

THE COURT: Friday. How is that?

MR. KRALL: That's fine, your Honor.

MR. GEORGE: That's fine, your Honor.

THE COURT: All right. After that why don't we set up oral argument on the first Friday after the 27th.

THE CLERK: February 3rd.

THE COURT: How is that at 2:00 o'clock in the afternoon?

MR. HOLLAND: That's fine, your Honor.

MR. KRALL: Yes, I will agree to that, your Honor.

THE COURT: All right. Now, as far as — was it Brownstown Township?

MR. GEORGE: Yes, your Honor.

THE COURT: Do you wish to submit a brief? I wasn't sure if the Township was actually a party joined by the Plaintiff or not.

MR. HOLLAND: Your Honor, I included the township for the reason that I didn't want this to go through the Court and then suddenly come back and find that we couldn't get a certificate of occupancy for some minor reason. I wanted to include this because we have been a long time without opening this facility and I wanted to make sure that (9) if there were any objections by the Township, that they raise them at this point.

THE COURT: Does the Township wish to submit any briefs on this particular issue before the Court?

MR. GEORGE: Your Honor, at this point we would say, no. I have discussed this matter with the Township officials. We have really no objection to Plaintiff's actions and we are ready, willing and able to issue a certificate of occupancy once the Plaintiff ties into the sewer and water system. Basically no allegations have been raised at this point that we have in any way interferred with the Plaintiff's ability to open for operation. At this point I don't see any reason why that would be the case in the future.

THE COURT: Okay, fine. So we will set it up then for a brief from the Plaintiff on the 17th of January, the Road Commission on the 27th and have a hearing on February 3rd at 2:00 P.M.

MR. KRALL: Your Honor, just for clarification, the nature of these briefs and arguments, now that again would be for summary judgment under the court rules as opposed to any order to show cause for preliminary injunction.

THE COURT: Well, the action is still injunctive relief. You are still asking for injunctive relief, is that correct?

* * *

# APPENDIX P

## MICHIGAN GENERAL COURT RULES OF 1963, GENERAL RULES OF PLEADING

**Rule 111 General Rules of Pleading.**

.1 Statement of Claim. A pleading which sets forth a claim for relief, whether a complaint, counterclaim, cross-claim or third-party claim, shall contain

(1) a statement of the facts without repetition upon which the pleader relies in stating his cause of action with such specific averments as are necessary reasonably to inform the adverse party of the nature of the cause he is called upon to defend;

(2) where the pleader seeks money, a statement that the amount in controversy exceeds $10,000 or is otherwise within the jurisdiction of the court; and

(3) a demand for judgment for the relief that the pleader seeks. If he seeks money, he shall demand judgment for "whatever amount [the pleader] is found to be entitled." However, the adverse party may under Rule 309 obtain a demand for a specific amount of money; if he does, the demand shall be treated as if it had originally been furnished under this subrule.

Declaratory relief, in cases of actual controversy, may be claimed. Relief in the alternative or of several different types may be demanded.

* * *

# APPENDIX Q

## EXCERPT OF TRANSCRIPT OF PROCEEDINGS

* * *

(294) * * * Q. Okay.

Now, in Mr. Loyer's situation, we had an estimate of $40,000, which has been revised a little maybe upwards a little maybe $40,000 now for him to do his project. Was there the same termination of (295) responsibility in Mr. Loyer's situation upon payment of a fixed amount of money?

A. No.

Q. Mr. Loyer's situation was open ended what [*sic*] is it not?

A. (No response.)

Q. I believe your testimony earlier was that if $40,000 wouldn't have covered the improvement that it was a possibility you would have go [*sic*] after Mr. Loyer for additional amounts; is that correct?

A. What we presented to Mr. Loyer was that he was required to place a passing lane.

Q. Well — Answer my question, please.

A. Which question?

Q. The one I just asked you?

A. Would you repeat it please.

Q. Sure.

In Mr. Loyer's situation, you testified earlier that if Mr. Loyer put up a letter of credit or anything else regarding this $40,000, if that amount was not enough to cover the improvement in the passing lane, that it was a possibility that the Wayne County Road Commission or its successor would go after Mr. Loyer for amounts over and above that $40,000?

A. That situation would come into play if Mr. Loyer, through the permit arrangement that was previously (296) agreed to, subsequently failed to place the passing lane, and then we made a decision based on safety considerations that it would have to be placed through our means at whatever cost.

* * *